Nos. 83-245 and 83-291

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
*Appellant,*

v.

R. A. GRAY & COMPANY,
*Appellee.*

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
*Appellant,*

v.

R. A. GRAY & COMPANY,
*Appellee.*

**On Appeal From The United States Court of Appeals For the Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF TRANSPORT MOTOR EXPRESS, INC., E.W. BOHREN TRANSPORT, INC., AND ESSEX GROUP, INC. IN SUPPORT OF APPELLEE R. A. GRAY & COMPANY

HARRIS WEINSTEIN*
ARVID E. ROACH II
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5302

Attorneys for *Amici Curiae*
Transport Motor Express, Inc.,
E.W. Bohren Transport, Inc.,
and Essex Group, Inc.

January 11, 1984

* Counsel of Record

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

**Nos. 83-245 and 83-291**

---

PENSION BENEFIT GUARANTY CORPORATION,
*Appellant,*

v.

R. A. GRAY & COMPANY,
*Appellee.*

---

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,
*Appellant,*

v.

R. A. GRAY & COMPANY,
*Appellee.*

---

**On Appeal From The United States Court of Appeals
For The Ninth Circuit**

---

## MOTION OF TRANSPORT MOTOR EXPRESS, INC., E. W. BOHREN TRANSPORT, INC., AND ESSEX GROUP, INC. FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLEE R. A. GRAY & COMPANY

---

Pursuant to Rule 42(3) of this Court, Transport Motor Express, Inc. ("TMX"), E.W. Bohren Transport, Inc. ("Bohren"), and Essex Group, Inc. ("Essex") hereby move for leave to file as *amici curiae* the brief attached hereto in No. 83-291,

the consent of the parties having been obtained to file said brief in No. 83-245. In support of this motion, *amici* state as follows:

1. This appeal involves a constitutional challenge to retroactive enforcement of the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("the MPPAA"). The interest of *amici* in this appeal derives from their status as recipients of a demand for MPPAA withdrawal liability of more than $8.6 million—many times the amount at stake in the present case—by reason of a pre-enactment business closure, which demand would be invalidated by an affirmance in this case.

2. The withdrawal liability provisions of the MPPAA, codified at 29 U.S.C. §§ 1381-1405, require any employer that permanently ceases, for any reason, to make contributions on behalf of its employees to a collectively-bargained multiemployer pension fund to pay to the fund, as "withdrawal liability," a share of the fund's total "unfunded vested benefits." The MPPAA was signed into law on September 26, 1980, but its withdrawal liability provisions apply retroactively to any withdrawal occurring on or after April 29, 1980. TMX and Bohren terminated their trucking operations on April 25-26, 1980, but continued to employ a small number of Teamster members for a short period after April 29, 1980. This is asserted by the Central States, Southeast and Southwest Areas Pension Fund to provide the basis for assessing withdrawal liability of more than $8.6 million, almost three times the combined net worth of TMX and Bohren. The Central States Fund asserts the right to collect the remaining amount from Essex, the corporate parent of TMX and Bohren.

3. *Amici* brought suit on August 10, 1981 in the United States District Court for the Northern District of Illinois, seeking to have the withdrawal liability provisions of the MPPAA declared unconstitutional as applied to them. *Transport Motor Express, Inc.* v. *Central States Fund,* 4 Empl. Ben. Cases (BNA) 1566 (N.D. Ill.), *remanded,* 4 Empl. Ben. Cases (BNA) 2502 (7th Cir. 1983). The record in that litigation shows how the MPPAA's withdrawal liability provisions are

actually being applied—including the confiscatory impact of the asserted liability, the multiemployer fund's self-interested use of the statute's one-sided procedures, and the fund's admitted lack of need for any withdrawal liability monies.

4. The district court in *TMX* entered summary judgment in favor of the Central States Fund. That decision was recently remanded by the Seventh Circuit, with instructions that the district court consider certain non-constitutional issues prior to decision of the constitutional questions.

5. The brief tendered by *amici* in support of the position of appellee R.A. Gray & Company first summarizes the facts of the *TMX* case—facts we believe to be representative of those confronting many employers subjected to retroactive enforcement of MPPAA withdrawal liability. The brief then argues that retroactive imposition of withdrawal liability on closed transactions is barred by this Court's decisions under the Due Process and Just Compensation Clauses of the Fifth Amendment. The tendered brief further argues that the retroactive withdrawal liability provisions of the MPPAA are also unconstitutional under the four-factor test articulated by the Seventh Circuit in *Nachman Corp.* v. *PBGC,* 592 F.2d 947 (7th Cir.), *cert. denied on constitutional holding,* 442 U.S. 940 (1979), *aff'd on statutory holding,* 446 U.S. 359 (1980).

6. *Amici* have requested the parties to consent to filing of the tendered brief. Consents have been provided by the appellee in both cases, R.A. Gray & Company, and by the appellant in No. 83-245, the Pension Benefit Guaranty Corporation, copies of which are being filed with the Clerk of the Court. The appellant in No. 83-291, Oregon-Washington Carpenters-Employers Pension Trust Fund, has not responded to *amici's* request for consent. This motion is being submitted to permit consideration of the tendered brief in both actions.

7. *Amici* filed a similar brief as *amici curiae* in this case in the court below. Leave to file that brief was granted by the Ninth Circuit.

WHEREFORE, it is requested that this motion be granted.

Respectfully submitted,

HARRIS WEINSTEIN*
ARVID E. ROACH II
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5302

Attorneys for *Amici Curiae*
Transport Motor Express, Inc.,
E.W. Bohren Transport, Inc.,
and Essex Group, Inc.

January 11, 1984

* Counsel of Record

Nos. 83-245 and 83-291

In The

# Supreme Court of the United States

October Term, 1983

Pension Benefit Guaranty Corporation,
*Appellant,*

v.

R. A. Gray & Company,
*Appellee.*

Oregon-Washington Carpenters-Employers
Pension Trust Fund,
*Appellant,*

v.

R. A. Gray & Company,
*Appellee.*

**On Appeal From The United States Court of Appeals For the Ninth Circuit**

## BRIEF *AMICI CURIAE* OF TRANSPORT MOTOR EXPRESS, INC., E.W. BOHREN TRANSPORT, INC., AND ESSEX GROUP, INC. IN SUPPORT OF APPELLEE R. A. GRAY & COMPANY

Harris Weinstein*
Arvid E. Roach II
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5302

Attorneys for *Amici Curiae*
Transport Motor Express, Inc.,
E.W. Bohren Transport, Inc.,
and Essex Group, Inc.

January 11, 1984

* Counsel of Record

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

---

**Nos. 83-245 and 83-291**

---

PENSION BENEFIT GUARANTY CORPORATION,
*Appellant,*

v.

R.A. GRAY & COMPANY,
*Appellee.*

---

OREGON-WASHINGTON CARPENTERS-EMPLOYERS
PENSION TRUST FUND,
*Appellant,*

v.

R.A. GRAY & COMPANY,
*Appellee.*

---

**On Appeal From The United States Court of Appeals
For the Ninth Circuit**

---

## BRIEF *AMICI CURIAE* OF TRANSPORT MOTOR EXPRESS, INC., E.W. BOHREN TRANSPORT, INC., AND ESSEX GROUP, INC. IN SUPPORT OF APPELLEE R.A. GRAY & COMPANY

---

This brief *amici curiae* in support of appellee R.A. Gray & Company ("Gray") is presented by Transport Motor Express, Inc. ("TMX"), E.W. Bohren Transport, Inc. ("Bohren"), and Essex Group, Inc. ("Essex") to assist the Court in considering the constitutionality of the retroactive application of the withdrawal liability provisions of the Multiemployer Pension

Plan Amendments Act of 1980 ("the MPPAA")[1] to employers that withdrew from multiemployer pension plans before the enactment of the statute on September 26, 1980 but on or after its retroactive effective date of April 29, 1980. *Amici* will show that the decision below[2] should be affirmed.

## THE INTEREST OF *AMICI*

*Amici* are plaintiffs in a suit challenging the constitutionality of an effort to collect over $8.6 million from them by retroactive application of the withdrawal liability provisions of the MPPAA.[3] TMX and its subsidiary Bohren were interstate motor carriers until April 25, 1980, when they notified their customers and others of the closure of their business as a result of severe losses. On April 25 and 26, 1980, most of their employees were dismissed, but a few remained on a temporary basis past April 28.

When they were active businesses, TMX and Bohren contributed to the Central States, Southeast and Southwest Areas Pension Fund at a fixed rate for each week worked by each covered employee. The contribution rate was fixed by collective bargaining agreements that TMX and Bohren had entered into with the Teamster union locals that represented their employees. The labor contracts, and therefore the obligation of TMX and Bohren to contribute to the Central States Fund, terminated with the end of the TMX and Bohren businesses. TMX and Bohren had no other obligations to the Fund, and did not promise their employees pensions in any amount.

---

[1] Pub. L. No. 96-364, 94 Stat. 1208 (1980). The withdrawal liability provisions of the MPPAA added Sections 4201-25 to the Employee Retirement Income Security Act of 1974 ("ERISA"), which are codified at 29 U.S.C. §§ 1381-1405.

[2] Shelter Framing Corp. v. PBGC, 705 F.2d 1502 (9th Cir. 1983), *aff'g* 543 F. Supp. 1234 (C.D. Cal. 1982).

[3] Transport Motor Express, Inc. v. Central States Fund, 4 Empl. Ben. Cases (BNA) 1566 (N.D. Ill. 1983), *remanded*, 4 Empl. Ben. Cases (BNA) 2502 (7th Cir. 1983).

In mid-1981, the Central States Fund demanded from TMX, Bohren, and TMX's parent, Essex,[4] immediate payment of withdrawal liability in a lump sum of over $8.6 million, or, in the alternative, payment of more than $11.2 million in monthly installments of $140,000 for a period of about 6½ years. The $8.6 million claimed is almost three times the net worth of TMX and Bohren. The monthly installments exceed the highest rate at which TMX and Bohren contributed to the Fund as going business concerns.

The claim against *amici* represents a part of the Central States Fund's unfunded vested benefits ("UVB"), as calculated *ex parte* by the Fund.[5] UVB is the amount by which the estimated present value of a fund's currently-vested pension benefits exceeds the value of the fund's current assets. A fund's UVB is not a fixed or readily ascertainable amount. Its determination requires a number of "actuarial assumptions," which can and do vary over a wide range. Much of the data to which these assumptions are applied must be estimated because employee records of multiemployer funds generally are incomplete.[6]

The record in the *TMX* case shows that the Fund's actuary arrived at, and the Fund trustees adopted, three radically different figures for UVB over a period of four months—first $2.047 billion, then $4.108 billion, and finally $3.576 billion. In changing from the first to the second amounts, the Fund and its actuary substantially enlarged UVB by discarding data samples obtained from employees and local unions that had previously been relied upon in making estimates of the Fund's liabilities,

[4] Essex is, in turn, a subsidiary of United Technologies Corporation.

[5] The Fund's actuarial assumptions and other determinations can be challenged only through compulsory arbitration, where those assumptions and determinations are subject to statutory presumptions of correctness. ERISA § 4221(a)(1), (3), 29 U.S.C. § 1401(a)(1), (3). On judicial review, arbitral findings are shielded by additional presumptions of correctness. *Id.* § 4221(c), 29 U.S.C. § 1401(c).

[6] In these respects the Central States Fund is typical of multiemployer funds.

and substituting selective extrapolations from other data.[7] The subsequent downward adjustment of UVB to $3.6 billion resulted primarily from a change in the interest rate assumption used in calculating present values from 6½ percent to a ten-year sliding scale equivalent to a flat 7½ percent rate. The Fund's actuary acknowledged that a still higher assumption, such as 9 percent, would have been reasonable. A 9 percent rate would have reduced UVB by a further $1 billion.

## SUMMARY OF ARGUMENT

Retroactive MPPAA withdrawal liability rewrites carefully-negotiated labor agreements after they have been fully performed, and imposes large liabilities on one party. This sort of nakedly retroactive legislation is condemned by every pertinent line of Supreme Court authority.

Under the Due Process Clause, retroactive laws must overcome a heavy burden of justification. This is because retroactivity denies a citizen the right to know the legal consequences of his conduct, and thereby strikes at the heart of the rule of law. This Court has repeatedly disapproved retroactive lawmaking, particularly in the area of pensions, where protecting reliance interests is particularly vital. *See, e.g., Arizona Governing Committee* v. *Norris,* 103 S. Ct. 3492, 3510 (1983) (Opinion of Powell, J.); *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 246 (1978); *City of Los Angeles Department of Water & Power* v. *Manhart,* 435 U.S. 702, 721 (1978); *Railroad Retirement Board* v. *Alton R.R.,* 295 U.S. 330 (1935).

Retroactive imposition of MPPAA withdrawal liability lacks the justification required to overcome Due Process restrictions on retroactive legislation. This overwhelming and

[7] Officials of the Fund testified that the initial jump from $2 billion to $4 billion resulted from an increase in "noncontributory past service credits" attributed to employee participants in the Fund. Such credits reflect periods for which no contributions were made on the employee's behalf, but which can be counted in pension determinations. The Fund's records of such creditable service are incomplete.

unanticipated liability is not necessary to satisfy any legitimate expectations of employees, who looked to their multiemployer pension funds—not the contributing employers—for their pensions. As employees were well aware, multiemployer funds were specifically designed to accommodate periodic employer withdrawals. The employers' sole contractual duty was to pay the agreed-upon contributions. Moreover, Congress effectively acknowledged that there was no need for retroactive enforcement of withdrawal liability when it changed the effective date of the MPPAA from February 1979 to April 1980 to accommodate politically-influential employers. Nothing in the legislative history of the MPPAA demonstrates any public need for the five months of retroactivity that were retained.

Retroactive MPPAA withdrawal liability also violates basic Contract Clause principles that illuminate the application of the Due Process Clause to Congressional legislation. As in *Allied Structural Steel, supra,* the effect of retroactive MPPAA withdrawal liability is to alter contractual duties with no adequate public justification. In contrast, the black lung benefits law upheld in *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976), while in some degree retrospective, was specifically compensatory, and included substantial grace periods and significant governmental sharing in the costs it imposed.

The Just Compensation Clause of the Fifth Amendment is also controverted by retroactive withdrawal liability, which seizes the entire net worth of employers without compensation, in order to confer undeserved and unbargained-for windfalls on multiemployer pension funds. This unprecedented retroactive destruction of reasonable, investment-backed expectations constitutes an unconstitutional taking.

The four-factor analytical framework of *Nachman Corp.* v. *PBGC,* 592 F.2d 947 (7th Cir.), *cert. denied on constitutional holding,* 442 U.S. 940 (1979), *aff'd on statutory holding,* 446 U.S. 359 (1980), provides further confirmation of the unconstitutionality of the retroactive withdrawal liability provisions of the MPPAA. With respect to *reliance interests,* this retroactive statute destroys employers' justified reliance on completed

arm's-length transactions while furthering no legitimate reliance interests of employees or multiemployer funds. The *prior regulation* of multiemployer pension funds in no way presaged retroactive withdrawal liability. The relevant *equities* also weigh heavily against the statute, for employers had no responsibility for the creation of multiemployer funds' unfunded vested benefits, and employers withdrawing prior to the enactment of the MPPAA are unjustly singled out to bear an even heavier burden than other employers. Finally, MPPAA withdrawal liability has no meaningful *moderating features,* particularly as applied to pre-enactment withdrawals.

## ARGUMENT

Retroactive imposition of MPPAA withdrawal liability reaches backward in time to reopen closed, arm's-length transactions, rewriting fully-performed collective bargaining agreements to benefit one party entirely at the expense of the other. Under the governing labor contracts—which were well understood by unions, employers and employees alike—the sole obligation of employers to multiemployer pension funds was to make agreed-upon contributions to the funds. Pension levels, fund investment practices and other fund policies were determined exclusively by trustees bound to act solely in the interests of plan beneficiaries. *NLRB* v. *Amax Coal Co.,* 453 U.S. 322 (1981). Nor did any employer have a duty to continue participating in a fund indefinitely; rather, the very purpose of multiemployer funds was to provide a mechanism for employees to obtain pension benefits in industries characterized by high levels of turnover among both employers and employees. Multiemployer funds were established specificially to permit employees to accumulate pension rights as they moved from employer to employer within such industries. PBGC, MULTIEMPLOYER STUDY REQUIRED BY P.L. 95-214, at 20-21 (1978).

Prior to enactment of the MPPAA in September 1980, a withdrawal from a multiemployer fund caused no liability. No employer was liable for any amount beyond its contractually required contributions unless the fund entirely terminated. In

that event, part [8] of the fund's UVB was paid by all employers involved with the fund, including those who had withdrawn during the prior five years. ERISA § 4064, 29 U.S.C. § 1364 (1976).[9] The MPPAA changed the law to create a new liability by imposing the withdrawal liability that gives rise to this case. *Id.* § 4201(a), 29 U.S.C. § 1381(a). This new liability was imposed retroactively on any employer who had withdrawn [10] on or after April 29, 1980, a date nearly five months before the MPPAA was signed into law on September 26, 1980. *Id.* § 4402(e)(2)(A), 29 U.S.C. § 1461(e)(2)(A).

The effect of the MPPAA is to impose months after the fact new and substantial liabilities on a fully-performed closed transaction. Retroactive liability of this character cannot be reconciled with this Court's decisions holding that the Due Process and Just Compensation Clauses of the Fifth Amendment restrict the enactment of retroactive legislation. At the heart of the arguments of appellants is the notion that so long as Congress acts "rationally," it is as free to legislate retroactively as it is to legislate prospectively. *E.g.*, PBGC Brief, pp. 19, 22. But in fact, it is clear that retroactive legislation must satisfy a higher burden of fairness and demonstrated public need than prospective legislation. The claims of appellants notwithstanding, it is firmly established that the Due Process Clause forbids "harsh and oppressive" retroactive legislation.[11]

---

[8] Even if the fund did terminate, each employer's liability was limited to a share of part (not all) of the multiemployer fund's UVB, up to a maximum of 30 percent of the employer's net worth. ERISA §§ 4022(b), 4064, 29 U.S.C. §§ 1322(b), 1364 (1976).

[9] The PBGC determined the amount of the liability, and employers were liable only for such vested benefits as the PBGC elected to guarantee. *Id.* § 4082(c), 29 U.S.C. § 1381(c) (1976). A "substantial employer" (generally, one that had made 10 percent or more of the contributions to a fund) was required on withdrawal to post security with the PBGC. However, this security was returned if the multiemployer fund did not terminate within five years. *Id.* § 4063, 29 U.S.C. § 1363 (1976).

[10] An employer is deemed to have withdrawn completely when the employer (1) permanently ceases to have an obligation to contribute to the plan, or (2) permanently ceases all covered operations under the plan. *Id.* § 4203(a), 29 U.S.C. § 1383(a).

[11] United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.13 (1977) (quoting Welch v. Henry, 305 U.S. 134, 147 (1938)).

The same clause also precludes Congress from radically impairing preexisting contracts much as the Contract Clause of Article I, § 10 of the Constitution limits state action.[12] In addition, the Just Compensation Clause forbids legislation that, like the MPPAA, takes one person's property for the benefit of another without compensation,[13] especially where the taking is retroactive.[14]

## I.

## RETROACTIVE WITHDRAWAL LIABILITY VIOLATES RESTRAINTS ON RETROACTIVE LAWMAKING IMPOSED BY THE DUE PROCESS CLAUSE

This Court last had occasion to address a retroactive statute comparable to the MPPAA in 1935. In *Railroad Retirement Board* v. *Alton R.R.*, 295 U.S. 330 (1935), all nine justices condemned a provision of the Railroad Retirement Act of 1934 that retroactively required railroads to pay pensions to individuals whose employment had ended prior to enactment. *See id.* at 348-49 (Opinion of the Court); *id.* at 389 (Opinion of Hughes, C.J.). Chief Justice Hughes, joined by Justices Brandeis, Stone and Cardozo, had no doubt that such retroactivity was "arbitrary and beyond the power of Congress," *id.*, notwithstanding their dissent from the portion of the Court's decision that overturned the prospective aspects of the very same pension legislation.

This distinction between retroactive and prospective legislation runs throughout the constitutional jurisprudence of the Court. "It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively." *Usery* v. *Turner*

---

[12] *See, e.g.*, Allied Structural Steel, *supra*, 438 U.S. at 241 & n.12 (citing Hale, *The Supreme Court and the Contract Clause: III*, 57 HARV. L. REV. 852, 890-91 (1944)).

[13] *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[14] *See, e.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935).

*Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). The reasons for this principle are basic to the rule of law. The essence of our legal system is that citizens are entitled to know the consequences of their acts. If retroactive lawmaking is constitutional, each person proceeds at the peril that a later-enacted statute will impose an important new burden on a past act. Absent a strong presumption against the validity of retroactive legislation, the "government of laws" described in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 157, 163 (1803), is undermined. It is not enough to argue, as appellants do (PBGC Brief, pp. 35-40; Pension Fund Brief, pp. 9-16), that the pendency of proposed legislation provides all the notice the Constitution requires. Even if it were possible to stay abreast of all proposed legislation, and to remain attuned day-by-day to the changing provisions of each proposal, the Constitution cannot possibly require individuals to guess at the final outcome of political controversies before determining a course of conduct.

Here, moreover, it was not Congressional action alone that an employer would have had to predict to account for the potential consequences of retroactive lawmaking. To assess the consequences of proposed action, an employer would have had to divine more than the contents of the MPPAA—it would also have had to gain access to the multiemployer fund's records and actuarial analyses to determine how much, if any, liability might result in the event of a withdrawal. Prior to enactment, even an omniscient employer that accurately predicted the passage, substance and effective date of the MPPAA would have been helpless in any effort to gauge the effect of withdrawing from a multiemployer fund, because the vital facts were beyond reach.[15]

The right to know the legal consequences of one's actions —to be confident that one is not subject to the risk of new liabilities by reason of a fully-closed transaction—is a core

---

[15] The law, as adopted, requires multiemployer plans to provide essential information to employers contemplating withdrawal. ERISA § 4221(e), 29 U.S.C. § 1401(e). No such right of access to information existed prior to adoption of the MPPAA.

value of our Constitution. It is expressly recognized as to criminal legislation in the Ex Post Facto Clause, and the same principle applies to civil legislation by way of the Due Process and Contract Clauses. This Court has accordingly made clear that the Due Process Clause forbids "harsh and oppressive" retroactive legislation. *See United States Trust Co.* v. *New Jersey,* 431 U.S. 1, 17 n.13 (1977) (quoting *Welch* v. *Henry,* 305 U.S. 134, 147 (1938)).[16]

Legislation that reaches backward in time to attach new liabilities to prior transactions has rarely been sustained. The Court's decision in *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U.S. 338 (1922), is a good example. A boat using a canal was compelled to pay tolls higher than the law allowed. A statute passed two years later purported to legalize the tolls retroactively. Justice Holmes, for a unanimous Court, declared that both the Due Process Clause and the Contract Clause forbade the retroactive law.[17]

Only last Term, this Court twice confirmed that retroactive changes in law are strongly disfavored. In *United States* v.

---

[16] *See generally* 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439-40, 448-49, 617 (rev. ed. 1937); THE FEDERALIST, No. 44 (Madison), at 301 (J. Cooke ed. 1961) (Bill of Attainder, Ex Post Facto and Contract Clauses constitute a "constitutional bulwark in favor of personal security and private rights"); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence,* 10 MINN. L. REV. 775, 790-97 (1936).

[17] A narrow exception to the constitutional proscription of retroactive lawmaking exists for income tax legislation, where limited retroactivity—generally within a single tax year—has been permitted. But this is permitted because income taxes are simply "a way of apportioning the cost of government" to all. Welch v. Henry, 305 U.S. 134, 146 (1938). Moreover, as the district court below recognized, taxes are "sui generis because of the taxable-year concept." 543 F. Supp. at 1252; *see also* Peick v. PBGC, 539 F. Supp. 1025, 1054 (N.D. Ill. 1982), *aff'd,* 4 Empl. Ben. Cases (BNA) 2473 (7th Cir. 1983). It is striking that even in the tax area, the Court has held that due process will not permit retroactive legislation where the tax imposed differs significantly from prior taxes. *See, e.g.,* Helvering v. Helmholz, 296 U.S. 93 (1935); Coolidge v. Long, 282 U.S. 582 (1931); Untermyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927), *modified,* 276 U.S. 594 (1928); Nichols v. Coolidge, 274 U.S. 531 (1927); Levy v. Wardell, 258 U.S. 542 (1922).

*Security Industrial Bank*, 103 S. Ct. 407 (1982), the Court held that retroactive application of a lien avoidance provision of the 1978 Bankruptcy Reform Act would pose "substantial" constitutional problems, and therefore resolved statutory ambiguities in favor of applying the provision prospectively only. *Id.* at 410-12. The Court emphasized that the retroactive taking of creditors' property could not be justified—as appellants attempt to justify retroactive MPPAA withdrawal liability—merely on the ground that it was a "rational" legislative action. *Id.* at 410. And in the final decision of the Term, *Arizona Governing Committee* v. *Norris*, 103 S. Ct. 3492 (1983), the Court gave solely prospective effect to its ruling that Title VII of the Civil Rights Act of 1964 requires pension benefit levels to be calculated without regard to the gender of the beneficiary, despite the principle that judicial decisions, unlike statutes, generally have retroactive effect. *Id.* at 3509-10. The Court's reason—that it would have been unjust to upset employers' reliance in structuring their pension plans on a reasonable interpretation of then-existing law—is identical to the principle that governs this case.[18] Many other decisions of this Court confirm the grave constitutional problems posed by retroactive legislation.[19]

Indeed, this Court has on every possible occasion held that the rules governing pension arrangements should not be changed retroactively. This has been so whether the retroactive

---

[18] *See also* City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 721 (1978) ("the rules that apply to [pension and insurance] funds should not be applied retroactively unless the legislature has plainly commanded that result"). Indeed, the Court in *Arizona Governing Committee* held that employers had not received sufficient notice of the Court's construction of Title VII to justify retroactive application despite the fact that "all but one of the lower courts that [had] considered the question" over a period of five years had adopted that construction. *See* 103 S. Ct. at 3497 (opinion of Marshall, J.). The present case involves a much clearer denial of notice of a change in the law.

[19] *See, e.g.*, Greene v. United States, 376 U.S. 149 (1964); Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936); Danzer Co. v. Gulf R.R., 268 U.S. 633 (1925); Union Pacific R.R. v. Laramie Stock Yards Co., 231 U.S. 190 (1913); Ettor v. City of Takoma, 228 U.S. 148 (1913); Winfree v. Northern Pacific Ry., 227 U.S. 296 (1913).

change is found in an Act of Congress, as in *Alton Railroad, supra;* in a state statute, as in *Allied Structural Steel, supra;* or in a court decree intended to right a violation of Title VII of the Civil Rights Act of 1964, as in *Arizona Governing Committee, supra.* The retroactive imposition of withdrawal liability under the MPPAA is no less harsh and oppressive than the changes in law at issue in those cases. Retroactive withdrawal liability cannot be squared with basic consitutional precepts and cannot be justified under any of this Court's prior decisions. The immense inequity of imposing this liability retroactively is illustrated in case after case. For example, the claim in issue in *TMX,* over $8.6 million, is nearly three times the total payments TMX and Bohren made to the Central States Fund during the years 1977 to 1979, and far exceeds the value of the two companies' assets.

Moreover, retroactive imposition of withdrawal liability is not needed to preserve equities attached to any other person's position. Multiemployer funds had no right or legitimate expectation to receive MPPAA withdrawal liability from employers that withdrew prior to enactment. The statute, moreover, compels payment to funds that face no risk of financial difficulty and have no need for withdrawal liability payments.[20] Retroactive withdrawal liability is an unanticipated windfall to the fund's beneficiaries and its remaining employer contributors. If the payments are used to increase benefits, employees will receive a windfall they had no fair reason to anticipate; if they are used to reduce contributions by employers remaining in the fund, then it is those employers that receive the unwarranted windfall.

One would expect the most compelling public need to be shown in support of so large an invasion of past acts and closed transactions. Yet Congress implicitly conceded that no public need supports the retroactive imposition of withdrawal liability. This occurred when Congress shifted the retroactive effective

[20] The Central States Fund's actuary has stated under oath that the Fund is financially sound, that employer withdrawals do not harm the Fund, and that the probability that the enormous Central States Fund will ever face insolvency even if it never collects a penny of withdrawal liability is "essentially *zero.*" Affidavit of Daniel F. McGinn, Feb. 11, 1981, ¶ 20, Robbins v. PBGC, No. 79-C-2601 (N.D. Ill.) (emphasis in original).

date of MPPAA withdrawal liability from February 27, 1979, as originally proposed, to the date finally adopted, April 29, 1980, in order to benefit politically powerful withdrawing employers. As a principal sponsor of the statute acknowledged, "the April 29 effective date is the product of strong political pressures by certain withdrawing employers who were caught by the earlier date." 126 CONG. REC. 20179 (1980) (remarks of Sen. Javits); *see also id.* at 20235 (remarks of Sen. Matsunaga) ("efforts of powerful lobbyists"). There is not a word in the legislative history of the MPPAA that establishes any public need for the five months of retroactivity that were retained.[21] It is apparent that the five-month retroactivity period finally settled upon by Congress was of no social significance, and that those employers arbitrarily caught by that period of retroactivity simply lacked the political muscle of others who would have been caught by the earlier proposed retroactivity date that Congress abandoned.[22] That lack of political power cannot possibly justify the exaction of millions of dollars of retroactively-imposed liability. The Due Process Clause forbids application of the MPPAA to those who had ended their contractual relations with multiemployer plans prior to enactment of the MPPAA.

---

[21] This absence of evidence in the legislative record is not surprising, as it is inherent in multiemployer plans that employers have little control over the timing of a withdrawal. Participation in such plans is through collective bargaining agreements. *See* Labor-Management Relations Act § 302(c), 29 U.S.C. § 186(c). An employer can withdraw only if the employees decertify a union, if a withdrawal is agreed to with the union, or if the business closes.

[22] The Congressional committee reports on the MPPAA offer no justification for retroactivity. *See* H.R. REP. No. 96-896, PT. I, 96th Cong., 2d Sess. 100, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2918, 2968; H.R. REP. No. 96-689, PT. II, 96th Cong., 2d Sess. 43, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 2992, 3032. The only suggestion in the extensive debates on the statute of any ground for retroactivity is a comment by Senator Matsunaga, speaking of the originally-proposed effective date of February 27, 1979, that "opportunistic employers" might have withdrawn while Congress was considering the bill unless there had been a threat of retroactive enforcement. 126 CONG. REC. 20234 (1980). There is not a shred of evidence anywhere in the legislative history that any such "opportunistic employers" actually existed, and Senator Matsunaga acknowledged that "powerful lobbyists" representing withdrawn employers caught by the February 1979 date dissuaded Congress from adopting that date. *Id.* at 20235; *see also id.* at 20179 (remarks of Sen. Javits). No one sought to explain why it was decided to retain five months of retroactivity.

## II.

## THE RETROACTIVE ALTERATION OF FULLY-PERFORMED CONTRACTS BY THE MPPAA VIOLATES CONTRACT CLAUSE PRINCIPLES IMPLICIT IN THE DUE PROCESS CLAUSE

The Constitution is infringed by a statute that alters fully-performed contracts as significantly as does the MPPAA.[23] The reason is that

> "contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."

*Allied Structural Steel, supra,* 438 U.S. at 245. Just as state impairments of contracts are forbidden by the Contract Clause, Congressional enactments that retroactively destroy settled contractual expectations run afoul of the Due Process Clause of the Fifth Amendment, which prohibits arbitrary infringement of liberty and property interests by the federal government.[24]

---

[23] *See, e.g.,* United States Trust, *supra;* Forbes Pioneer Boat Line, *supra;* W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 61 (1935) (Cardozo, J.) (statute undermining bondholders' rights in property securing their bonds) (cited in Exxon Corp. v. Eagerton, 103 S. Ct. 2296, 2306 (1983)).

[24] This Court has held that fundamental constitutional limits on state action apply to federal action via the Fifth Amendment's Due Process Clause. *See, e.g.,* Bolling v. Sharpe, 347 U.S. 497, 500 (1954). Whatever may be the full extent to which Contract Clause principles apply to federal action, Congress must at least be subject to such principles where, as here, a wholly retroactive statute reopens and radically rewrites fully-performed contractual arrangements. *See* Thorpe v. Housing Authority, 393 U.S. 268, 278-79 & n.31 (1969); De La Rama S.S. Co. v. United States, 344 U.S. 386, 388 (1953); Kuehner v. Irving Trust Co., 299 U.S. 445, 451-52 (1937); Perry v. United States, 294 U.S. 330, 353-54 (1935); Lynch v. United States, 292 U.S. 571 (1934); Shelter Framing, *supra,* 705 F.2d at 1513 n.12; Fornaris v. Ridge Tool Co., 423 F.2d 563, 566-67 (1st Cir.), *rev'd on other grounds,* 400 U.S. 41 (1970).

In *Allied Structural Steel,* the Court applied the Contract Clause to strike down a Minnesota pension law that applied only prospectively, but altered the obligations of pre-existing labor agreements. The statute required any employer of 100 or more employees that terminated a pension plan or closed a Minnesota office to provide full pensions for all employees who had worked for the company for at least ten years, even if the employees' pensions had not vested under applicable contracts. The Court held that this "severe disruption of contractual expectations," inflicted "in an area where the element of reliance was vital—the funding of a pension plan," violated the Contract Clause. *Id.* at 246-47.

As the Court recently noted in discussing *Allied Structural Steel,* the Minnesota pension statute struck down there could not be justified as a regulatory measure with a mere incidental effect on contracts, because "its sole effect was to alter contractual duties." *Exxon Corp.* v. *Eagerton,* 103 S. Ct. 2296, 2306 (1983). The same is true of retroactive MPPAA withdrawal liability. Contracts alone gave rise to an employer's obligation to contribute to multiemployer pension funds. The MPPAA imposes retroactive liability only upon those who by contract agreed to make such contributions, and does so by substantially enlarging the obligations of one party to a complex and carefully-bargained employment agreement.

In *Allied Structural Steel,* the Court contrasted the action of the Minnesota legislature to that of Congress, which had included several statutory grace periods in the single-employer pension plan provisions of ERISA in 1974. 438 U.S. at 247, 249 n.23; *see* ERISA §§ 211(b)(2), 306(b), 514(a), 29 U.S.C. §§ 1061(b)(2), 1086(b), 1144(a). *Cf. Turner Elkhorn, supra,* 428 U.S. at 8-10 (delayed effectiveness of black-lung benefits statute). In enacting the MPPAA, Congress did not show similar constitutional discipline. In contrast to the single-employer provisions of ERISA, the withdrawal liability provisions of the MPPAA afforded no grace period during which employers could withdraw from multiemployer funds without incurring heavy liabilities. This omission had a drastic effect on

employers, who, as the Ninth Circuit held (705 F.2d at 1511-12), could and would have acted to avoid liability had they been able to do so.[25]

Gray and TMX bargained with their employees in the good faith expectation that they faced no prospect of added liability if business circumstances thereafter required them to discontinue contributions to their multiemployer funds. Many months after full performance of their contractual obligations, Congress sought to impose large retroactive liabilities as an unanticipated incident of their fully-performed contracts. This is an even more severe legislative incursion into contractual rights than the one condemned in *Allied Structural Steel*.

The Court's holdings in *Alton Railroad* and *Allied Structural Steel* are usefully contrasted with the decision in *Turner Elkhorn, supra*. In the latter case, the Court sustained a statute requiring mine operators to bear some of the cost of compensating their former employees for black lung disease resulting from unhealthy mining conditions. The statute worked retrospectively in the sense that it compensated employees whose disease antedated enactment of the law, but it was not purely retroactive because liability was imposed only on employers who remained in the industry for a period of time after enactment. 428 U.S. at 8-10. For a substantial period following enactment, companies were free to leave the industry and avoid liability altogether. *See id.* A large portion of the total cost of providing health benefits was borne by the government, including the total cost of all claims filed in the first 3½ years following enactment. The employers paid part of the cost of claims filed in the next six months and were made fully liable only for claims filed more than four years after the statute was enacted. *Id.* Moreover, the purpose of the statute was purely compensatory. Each company was required to pay certain claims of its own former employees if their disease arose from employment with the particular company. For decades,

---

[25] *See* Turner Elkhorn, *supra*, 428 U.S. at 17 n.16 (noting importance of whether "a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided liability by altering his conduct").

the mine operators had "clearly been aware of the danger" to which they were exposing their employees. *Id.* at 17. The Court expressly distinguished the black lung statute from the retroactive pension scheme in *Alton Railroad:*

> "The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employees labored—to allocate to the mine operator an actual, measurable cost of his business."

*Id.* at 19.

Retroactive imposition of MPPAA withdrawal liability does not compensate for any harm done by an employer to a multiemployer fund or to the employer's former employees.[26] All concerned understood that the only "actual, measurable cost" (428 U.S. at 19) an employer incurred with respect to a multiemployer fund was the cost of agreed-upon contributions. Moreover, the exaction of withdrawal liabilities has no necessary impact on a pension fund's UVB—the trustees are entirely free to increase pension benefits at will, thereby leaving UVB constant or higher no matter how many millions of dollars in withdrawal liability are collected.[27] Nor does the MPPAA fulfill any legitimate expectation of employees. Rather, imposing withdrawal liability on pre-enactment withdrawals undoes completed arm's-length bargains that were fully understood by union, employer and employees alike. A key term of those bargains was that the employers were responsible only for fixed contributions to the multiemployer fund. The employers promised no pension benefits.[28] It was the province of the trustees of the multiemployer fund to determine what pension amounts could be supported by the promised contributions. Had the employers contracted to provide pensions in specified

---

[26] An employer must pay a share of a multiemployer fund's UVB as withdrawal liability even if *none* of its own former employees is entitled to a penny in vested pension benefits.

[27] *See, e.g.,* Peick, *supra,* 539 F. Supp. at 1047 n. 45.

[28] The district court below so held. 543 F. Supp. at 1250.

amounts regardless of cost, the other terms of their collective bargaining agreements would undoubtedly have been significantly different—employers would have been able to bargain for lower wages and other compensation, and, if they had participated in a multiemployer fund at all, they would surely have sought control over benefit levels, investment policies and other operations of the fund. To redraw those bargains after they have been fully performed, in order to benefit one side at great cost to the other, is retroactive alteration of legitimate contractual rights and expectations in its most naked form.

These differences between the Black Lung Act and the MPPAA display the fallacy of appellants' argument that the outcome of this case must be the same as in *Turner Elkhorn.* As the Ninth Circuit stated in finding retroactive imposition of withdrawal liability to be unconstitutional: "This burden on the employers lacks the justification present in *Turner Elkhorn Mining.*" 705 F.2d at 1513.

Retroactive MPPAA withdrawal liability clearly cannot survive scrutiny under the principles this Court has developed in applying the Contract Clause, which serve in this case to illuminate the application of the Due Process Clause to federal legislation. No legal system based on the principled application of a rule of law can countenance such legislation, and it ought not to survive scrutiny under the Due Process Clause of the Fifth Amendment.

## III.

## THE MPPAA'S RETROACTIVE WITHDRAWAL LIABILITY PROVISIONS EFFECT AN UNCONSTITUTIONAL TAKING

Imposing liability on pre-enactment withdrawals separately violates the Just Compensation Clause of the Fifth Amendment, which bars Congress from taking property without compensation from one person simply to benefit another. *See, e.g., United States* v. *Security Industrial Bank,* 103 S. Ct. 407, 410-12 (1982); *Thompson* v. *Consolidated Gas Utilities Corp.,* 300 U.S. 55, 76-80 (1937); *Louisville Joint Stock Land Bank* v.

*Radford*, 295 U.S. 555, 602 (1935); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922).[29]

The key factors in judging whether an unconstitutional taking has occurred were summarized in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979). They are: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action." *Id.* at 175.

The "economic impact" of MPPAA withdrawal liability is severe. It does not merely regulate the use or enjoyment of property. It destroys vested contract rights, *see Lynch* v. *United States*, 292 U.S. 571, 579 (1934), and takes large amounts of money to subsidize or increase pensions the employer did not establish. As shown by *TMX* and many other cases,[30] MPPAA withdrawal liability can take the entire equity of an enterprise.

The MPPAA's "interference with reasonable investment backed expectations" is beyond question. The MPPAA changes a company's obligations "in an area where the element of reliance was vital—the funding of a pension plan." *Allied Structural Steel, supra*, 438 U.S. at 246; *see also Arizona Governing Committee, supra*, 103 S. Ct. at 3510; *City of Los Angeles Department of Water & Power, supra*, 435 U.S. at 721. Prior to the MPPAA, Congress had only once attempted to impose new pension obligations on past employment relationships, and this Court had unanimously struck down that action in *Alton Railroad*. Only two years before the MPPAA was enacted, the Court had noted approvingly that ERISA, in making employers liable for part of the unfunded vested benefits of terminated single-employer pension plans, included grace periods and was not retroactive. *Allied Structural Steel, supra*, 438 U.S. at 247, 249 n.23. Thus, employers contributing

---

[29] The court below did not address the taking issue. *See* 705 F.2d at 1515.

[30] *See, e.g.*, Johnson Motor Lines, Inc. v. Central States Fund, No. 81-C-3703 (N.D. Ill.) (total asserted liability in this and related cases of $20.2 million against net assets of liquidated company and its parent of $9.5 million); Auclair Transp., Inc. v. Amaral, No. 81-546-L (D.N.H.) (liability of $2.5 million demanded from company with net liquidation proceeds of $1.7 million).

to multiemployer funds had every reason to believe that the law would not countenance retroactive imposition of pension obligations on closed transactions.

The "character of the governmental action" represented by MPPAA is also apparent. The MPPAA decrees that one party shall pay an enormous sum of money to another. This is a clear taking of property by the government without compensation.[31] Moreover, employers subjected to the provisions of the MPPAA did not have the means of avoiding or reducing the crippling penalty of withdrawal liability that Congress made available to firms that remained in a multiemployer fund after enactment of the MPPAA.[32]

## IV.

## THE LOWER COURT DECISIONS RELIED UPON BY THE PBGC DO NOT SUPPORT THE CONSTITUTIONALITY OF RETROACTIVE MPPAA WITHDRAWAL LIABILITY

Rather than confronting the governing Supreme Court precedents discussed above, the PBGC relies heavily on lower court decisions sustaining a 1964 tax on purchases of foreign securities from foreign nationals. But the 1964 statute is not analogous to the MPPAA.

Retroactivity is common in the tax field; tax statutes raise revenues for the common good, rather than rewriting private bargains, and courts have accordingly recognized that retroactive tax statutes are "sui generis." *Shelter Framing, supra,* 543 F. Supp. at 1252. Moreover, the individuals taxed for purchasing foreign stocks from foreign owners in *First National Bank in Dallas* v. *United States,* 420 F.2d 725 (Ct. Cl.), *cert. denied,*

---

[31] The seizure of all of a firm's equity, in the form of compulsory money payments, is unquestionably a taking. *See, e.g.,* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). The contrary conclusion in the Seventh Circuit's *Peick* decision (Slip Op. at 50-53, *aff'g* 539 F. Supp at 1040 n.30) is plain error.

[32] These included attempting to renegotiate the trust agreement to limit benefit levels (Peick, *supra,* 539 F. Supp. at 1049); freeing themselves of liability by an exempt asset sale (ERISA § 4204, 29 U.S.C. § 1384); and reducing their participation in the fund gradually without incurring liability (*id.* § 4205, 29 U.S.C. § 1385).

398 U.S. 950 (1970),[33] had voluntarily entered into those transactions after being personally notified, pursuant to procedures jointly developed by the Treasury Department and the securities exchanges, that their purchases would be subject to the tax. *Id.* at 726-27. Furthermore, they were free to purchase the same securities on the same exchanges from domestic rather than foreign sellers without incurring the tax. *Id.* at 727. Employers like TMX, in contrast, became contractually bound to their multiemployer pension funds before the MPPAA was first proposed in Congress,[34] and the MPPAA did not provide them with any alternative that would have eliminated liability. Also in sharp contrast to the present circumstances, the need for retroactive enforcement of the 1964 tax law was spelled out with particularity in a Presidential proclamation,[35] and the effective date held essential by the President and publicized by the Treasury Department and the securities exchanges was the date actually enacted.

The issue in this case is not, as appellants would prefer to have it, whether Congress ever can, in cases of sufficient need, legislate retroactively to deal with serious harms accruing while a statute is being considered. Rather, the rare case in which Congress has enacted retroactive laws in response to such a clear need only underscores the absence of any such need here.

---

[33] The PBGC's reliance on United States v. Binder, 453 F.2d 805 (2d Cir. 1971), *cert. denied,* 407 U.S. 920 (1972), is misplaced; that was a criminal case involving a prosecution for *post-enactment* conduct.

[34] TMX and Bohren signed their Teamster contracts on April 1, 1979. The first of the bills that led to the MPPAA was introduced on May 3, 1979. 125 CONG. REC. 9643, 9800 (1979).

[35] The President described a critical short-term balance of payments crisis facing the nation which could be counteracted only by immediate effectiveness of the tax. *See Message from the President,* 109 CONG. REC. 12806, 12808-09 (1963) (describing "the flood of foreign securities sales in our markets" and explaining that "the effectiveness of this tax requires its immediate application").

## V.

## THE UNCONSTITUTIONALITY OF RETROACTIVE MPPAA WITHDRAWAL LIABILITY IS CONFIRMED BY THE SEVENTH CIRCUIT'S FOUR-FACTOR ANALYSIS IN *NACHMAN CORP.* v. *PBGC*

In *Nachman Corp.* v. *PBGC*, 592 F.2d 947 (7th Cir.), *cert. denied on constitutional holding*, 442 U.S. 940 (1979), *aff'd on statutory holding*, 446 U.S. 359 (1980), the Seventh Circuit weighed four factors in assessing the constitutionality of provisions of ERISA that render an employer terminating a single-employer pension plan partially liable for the unfunded vested benefits of the plan.[36] Those factors were: (1) the reliance interests of the parties; (2) the scope of prior regulation; (3) the equities of the burdens imposed by the statute; and (4) the extent to which the statute contains "provisions designed to limit and moderate the impact of the burden" it imposes. *Id.* at 960.

As *Nachman* recognized, the legislation at issue there was not purely retroactive, because it did not apply new burdens to closed transactions. *Id.* at 958. Rather, much like the statute at issue in *Turner Elkhorn*, the single-employer provisions of ERISA phased in new liabilities in stages spread over a period subsequent to enactment. *See* page 15 *supra*. ERISA imposed liability only on terminations of single-employer plans occurring after a four-month grace period following enactment but the statute had retrospective effects insofar as it altered the obligations of pre-existing contracts that were not renegotiated during this four-month period.

The court below—like virtually all lower courts that have considered the constitutionality of the withdrawal liability

[36] Those provisions differ from the withdrawal liability provisions of the MPPAA. They make the employer liable for only the portion of the plan's UVB guaranteed by the PBGC, ERISA § 4062(b), 29 U.S.C. § 1362(b), which may be considerably less than total UVB. For example, the PBGC guarantees at most a part—and may guarantee none—of benefits added within five years before plan termination. *Id.* § 4022(b)(7), 29 U.S.C. § 1322(b)(7). Also, liability is limited to 30 percent of employer net worth. *Id.* § 4062(b), 29 U.S.C. § 1362(b).

provisions of the MPPAA—applied the *Nachman* factors to arrive at its conclusion. While the PBGC vigorously opposes such an analysis, it misapprehends the roots and purpose of the *Nachman* approach. That opinion, and the ones that have applied its theory, merely seek to organize for analytical purposes the various factors that this Court considered in *Turner Elkhorn, Allied Structural Steel, Alton Railroad* and other cases in judging the constitutionality of retrospective legislation. The fidelity of the *Nachman* factors to this Court's modern constitutional decisions is beyond challenge, even though it may fairly be debated whether so complex an analysis is necessary in reviewing the imposition of MPPAA withdrawal liability on transactions completely performed prior to the enactment of the statute.

*Amici* suggest that it is not necessary to invoke the analytical framework of *Nachman* because the impact of retroactive MPPAA withdrawal liability on closed transactions is so much harsher than the impact of the prospectively-effective single-employer provision of ERISA.[37] Nonetheless, it is clear that retroactive MPPAA withdrawal liabililty is unconstitutional under the *Nachman* analysis. This is confirmed by the decision below, which applies the *Nachman* factors to strike down retroactive withdrawal liability. The contrary rulings of

---

[37] Fully-retroactive statutes, such as the retroactive withdrawal liability provisions of the MPPAA, are much more severe in their consequences than prospective legislation having effects on executory contracts. Employers who were participating in multiemployer funds at the date of enactment of the MPPAA were able to avoid withdrawal liability altogether or reduce their potential liability (*see* note 32 *supra*), whereas companies like Gray and TMX had no such options. Moreover, a prohibition of retroactive legislation does not restrict the power of Congress to legislate prospectively, whereas barring the legislature from regulating executory contracts would confer on private persons a potentially unlimited power to "pre-empt" legislative authority. *See, e.g.*, Exxon Corp. v. Eagerton, 103 S. Ct. 2296, 2305-06 & n.12 (1983); Norman v. Baltimore & O. R.R., 294 U.S. 240, 304-11 (1935); Louisville & Nashville R.R. v. Mottley, 219 U.S. 467, 482 (1911); Hudson County Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

the Fourth and Seventh Circuits in the *Republic*[38] and *Peick*[39] cases are based on a mistaken application of the *Nachman* factors.[40]

## A. Reliance

There is no doubt that MPPAA withdrawal liability severely invades the reliance that employers placed on the terms of the labor agreements they entered into well before the statute was enacted. The statute imposes a new obligation in derogation of those contracts. That obligation can consume the entire net worth of the employer, and must be paid even to multiemployer funds that are so strong financially that there is no chance they will ever need the money.

By contrast, the employee beneficiaries of a multiemployer fund have no significant reliance interest at stake. Those

---

[38] Republic Industries, Inc. v. Teamsters Council 83 Fund, 718 F.2d 628 (4th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3292 (U.S. Sept. 29, 1983) (No. 83-541).

[39] Peick v. PBGC, 4 Empl. Ben. Cases (BNA) 2473 (7th Cir. 1983).

[40] The threshhold question asked in *Nachman* was whether there was a need for "the retroactive effects as a means of achieving the Congressional purpose." 592 F.2d at 958. *See also* Turner Elkhorn, *supra*, 428 U.S. at 17. Whatever else can be said for the MPPAA, its retroactivity cannot be sustained if it was not demonstrably "necessary to achieve the legislative purpose." Nachman, *supra*, 592 F.2d at 962. The committee reports on the MPPAA, which were issued when the bill contained a retroactive effective date of February 27, 1979, simply recite that date, without explaining the effort to attach liability to closed transactions. *See* note 22 *supra*. In advancing the effective date of the MPPAA to April 29, 1980 to benefit politically powerful employers, Congress itself conclusively rebutted any notion that retroactivity was needed to deter or penalize withdrawals occurring while the statute was under consideration. *See also* Turner Elkhorn, *supra*, 428 U.S. at 17-18 (suggesting that, in any event, "deterrence" or "blameworthiness" would not have been permissible purposes for retrospective lawmaking). As noted at page 13 *supra*, not a word in the legislative history of the MPPAA establishes a need for the five months of retroactivity that were retained. And in no event would any concept of deterrence justify application of the MPPAA to employers such as *amici*, whose decision to shut down was made, announced and acted upon prior to the disclosure on April 29, 1980 (126 CONG. REC. 9236-37 (remarks of Sen. Bentsen)) that the statute would apply to any withdrawal occurring after April 28, 1980.

beneficiaries neither received nor relied on any promises by the employer, other than to make specified contributions to the fund—contributions that were duly made. Employees knew from the outset that the multiemployer funds to which they looked for pension benefits were specifically designed to continue as some employers withdrew and new employers entered. As the PBGC itself has noted, the entire point of these funds is to provide pensions in industries where employers come and go, and to enable employees to continue to accrue eligible service toward pensions as they change employers. PBGC, MULTIEMPLOYER STUDY REQUIRED BY P.L. 95-214, at 20-21 (1978); *see also Republic, supra,* 718 F.2d at 632 n.1.

When MPPAA withdrawal liability is imposed on *preenactment* withdrawals, the balance of reliance interests decisively favors the employer. Employers who withdrew before enactment not only relied on the terms of a contract; they relied on the finality of a closed transaction, as TMX and Bohren did in taking irreversible steps to close their businesses. In contrast, their employees never relied on a single commitment or expectation other than those that the employers completely and faithfully fulfilled.

Thus, as the court below concluded (705 F.2d at 1511-12), retroactive enforcement of MPPAA withdrawal liability severely invades the reliance interests of the affected employers and furthers no countervailing reliance interest of employees. The *Republic* (718 F.2d at 638) and *Peick* (Slip Op. at 43-44) decisions simply err in asserting that employers promised pensions, rather than agreed-upon contributions. The employers in fact did not make such promises, and their employees, and the unions that represented them, fully understood this.

**B. Prior Regulation**

The *Nachman* court properly treated the question of prior regulation as a minor and subsidiary aspect of the reliance issue. 592 F.2d at 962 & n.33; *accord, Shelter Framing, supra,* 543 F. Supp. at 1251. Where, as here, the balance of reliance interests overwhelmingly points to a statute's unconstitutionality, the existence of some modest prior regulation in

the same general area will not change that result. *See, e.g., Allied Structural Steel, supra,* 438 U.S. at 249-50 (state pension law struck down despite prior federal pension regulation); *Lynch, supra* (repudiation of war risk insurance policies held unconstitutional despite previous regulation).

Before the MPPAA, withdrawal from a multiemployer plan did not give rise to liability. Only termination of a multiemployer plan—an extraordinarily rare event—resulted in statutory liability, and then the liability was shared by all employers involved in the plan, including those who had withdrawn within five years of termination. By imposing liability on withdrawals—even if, as in this case *(see* JA 74) and *TMX,* the multiemployer fund faces no prospect of ever terminating—the MPPAA created a totally new liability.[41]

This change is particularly harsh as applied to pre-enactment withdrawals. As the district court stated below (543 F. Supp. at 1251), and the Ninth Circuit confirmed (705 F.2d at 1512), employers "could not reasonably have foreseen a change of this scope and nature in the regulation of the field, especially when applied on a totally retroactive basis." *Accord, Untermeyer* v. *Anderson,* 276 U.S. 440, 445-46 (1928).

Before the MPPAA, the one effort Congress had made to enact a retroactive pension statute had been unanimously overturned by the Supreme Court. Congress had carefully avoided retroactive application of ERISA, and had been praised by this Court in 1978 for that action. *Allied Structural Steel, supra,* 438 U.S. at 247, 249 n.23.[42] Employers thus had every right to rely on the complete absence of any prior regulation of closed transactions. Neither *Republic* (718 F.2d at 638) nor *Peick* (Slip Op. at 44) recognizes this absence of

---

[41] Thus, this is not a case where existing regulation has merely been clarified or prospectively modified. *See* FHA v. The Darlington, Inc., 358 U.S. 84 (1958); Veix v. Sixth Ward Building & Loan Ass'n, 310 U.S. 32 (1940), analyzed by both the district court (543 F. Supp. at 1251) and the court of appeals (705 F.2d at 1512) below.

[42] The Black Lung Act similarly refrained from imposing liability on employers who had left the business before enactment. *See* Turner Elkhorn, *supra,* 428 U.S. at 8-10.

any prior regulation of closed transactions in the pension field, or of any imposition of liability in the absence of termination of a pension plan.

**C. The Equities**

The relevant equities strongly point to the unconstitutionality of retroactive MPPAA withdrawal liability. It cannot possibly be equitable to make an employer responsible for a fund's UVB when the governing contracts and legal principles (*NLRB* v. *Amax Coal Co.,* 453 U.S. 322 (1981)) placed exclusive control over benefit levels, investment policies and fund administration in the hands of the fund's trustees. In contrast, the employer who established a single-employer defined benefit plan, as in *Nachman,* agreed to pay a pension in a specified amount regardless of cost, and also retained the right to manage the investment of the funds it contributed to the plan. As the Ninth Circuit held (705 F.2d at 1512-14), these factors make the withdrawal liability provisions of the MPPAA fundamentally different from the single-employer plan termination provision of ERISA that were sustained in *Nachman* and the black lung provisions that were sustained in *Turner Elkhorn,* and make the MPPAA indistinguishable from the laws that were struck down in *Alton Railroad* and *Allied Structural Steel.* The *Republic* (718 F.2d at 638-39) and *Peick* (Slip Op. at 464-47) decisions sustain retroactive withdrawal liability only by ignoring these fundamental differences.

Moreover, the equities of employers that withdrew before enactment are unique—they had none of the options available to employers that continued after enactment to participate in a fund (*see* note 32 *supra* ), and thus were arbitrarily singled out "to bear a very disproportionate burden." *Shelter Framing, supra,* 543 F. Supp. at 1253.

**D. Moderating Features**

The absence of any meaningful mitigation of retroactive MPPAA withdrawal liability is, in the words of the Ninth Circuit (705 F.2d at 1514), "the most significant distinction" between that liability and the single-employer liability upheld in *Nachman.*

The MPPAA contains none of the significant moderating features that the *Nachman* court held crucial in sustaining the single-employer plan termination provisions of ERISA (592 F.2d at 962-63), and that this Court found to distinguish ERISA from the state pension statute struck down in *Allied Structural Steel* (438 U.S. at 247, 249 n.23). Rather than imposing liability after a four-month grace period as in ERISA or a 3½ year period as in the Black Lung Act, the MPPAA is nakedly retroactive. Instead of basing liability on a limited portion of UVB as calculated by the PBGC under the single-employer provisions of ERISA (*see* notes 9 & 36 *supra*), the MPPAA bases liability on the full amount of a fund's UVB as computed by the self-interested claimant fund itself (ERISA §§ 4201(b)(1), 4202, 4211, 29 U.S.C. §§ 1381(b)(1), 1382, 1391). Instead of limiting liability to 30 percent of the employer's net worth (*id.* § 4062(b), 29 U.S.C. § 1362(b)), the MPPAA provides for liability up to the full value of an employer's business (*id.* § 4225(b), 29 U.S.C. § 1405(b)). Instead of providing for insurance against liability for all employers (*Nachman,* 592 F.2d at 963), the MPPAA offers only the inchoate possibility of a so-called "withdrawal liability payment fund" (ERISA § 4223, 29 U.S.C. § 1403), which if ever established, would be available only to assist employers withdrawing after enactment of the statute. Instead of "reasonable terms for the payment of liability" (*Nachman,* 592 F.2d at 963), the MPPAA's installment-payment scheme can require payment over a period of twenty years at a rate exceeding the employer's contributions when it was a going concern participating in the fund (ERISA § 4219(c)(1), 29 U.S.C. § 1399(c)(1)); in *amici's* case, for example, the demand is for payments for more than six years exceeding in annual amounts the largest contributions they ever made as going concerns.

Nor do any other features of the MPPAA provide any genuine moderation. The *de minimis* exemption (*id.* § 4209, 29 U.S.C. § 1389) simply reallocates liability from one employer to another (*see, e.g., id.* § 4211(b)(1)(C), (b)(4), (c)(5)(B), 29 U.S.C. § 1391(b)(1)(C), (b)(4), (c)(5)(B)). Limited exemptions for certain asset sales and some trucking construc-

tion and entertainment industry funds (*id.* §§ 4203(b)-(d), 4204, 29 U.S.C. §§ 1383(b)-(d), 1384) simply point up the unfair treatment of nonexempt employers; they do not apply evenhandedly to reduce all employers' liability as do the key ERISA moderating features cited in *Nachman*. And the theoretical right to reenter a fund (*id.* § 4207(b), 29 U.S.C. § 1387(b)) is meaningless for employers that, like TMX, have irrevocably closed their business, or for employers that as a consequence of union decertification, property condemnation, or other causes have no power to reverse their withdrawals.

Also, any notion that Congress "spread the pain around" (*Peick*, 539 F. Supp. at 1052) is simply mistaken. Provisions in the MPPAA for limited reductions in guaranteed benefits of distressed multiemployer funds, PBGC subsidies to insolvent plans, and higher insurance premiums (*id.* at 1051-52) do nothing to reduce the UVB figure that is the basis for withdrawal liability assessments; accelerated funding (*id.* at 1051) can reduce UVB in the future, but only at the expense, dollar for dollar, of the same employers that the MPPAA makes liable for that future UVB.

When withdrawal liability is imposed, as here, on pre-enactment withdrawals, there is, as the court below recognized (705 F.2d at 1514-15), no meaningful moderation whatever. This absence of any mitigation of liability for pre-enactment withdrawals is overlooked entirely in the *Republic* (718 F.2d at 639) and *Peick* (Slip Op. at 47-48) decisions.

In sum, all four of the *Nachman* factors point to the unconstitutionality of exacting MPPAA withdrawal liability for pre-enactment withdrawals.

## CONCLUSION

This Court should affirm the decision of the court of appeals, and hold that MPPAA withdrawal liability unconstitutional as imposed on pre-enactment withdrawals.

Respectfully submitted,

HARRIS WEINSTEIN*
ARVID E. ROACH II
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P. O. Box 7566
Washington, D.C. 20044
(202) 662-5302

Attorneys for *Amici Curiae*
Transport Motor Express, Inc.,
E. W. Bohren Transport, Inc.,
and Essex Group, Inc.

January 11, 1984

* Counsel of Record.

## CERTIFICATE OF SERVICE

I certify that on this 11th day of January, 1984, I served two copies of the foregoing motion and brief by first class mail on each of the following counsel:

HENRY ROSE, ESQ.
*General Counsel*
Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006

THOMAS M. TRIPLETT, ESQ.
Schwabe, Williamson, Wyatt, Moore & Roberts
1200 Standard Plaza
110 S.W. Sixth Avenue
Portland, Oregon 97204

WILLIAM B. CROW, ESQ.
Miller, Nash, Yerke, Wiener & Hager
900 S.W. Fifth Avenue
Portland, Oregon 97204

DAVID S. PAULL, ESQ.
Bailey & Paull
5441 S.W. Macadam Avenue
Portland, Oregon 97201

______________________________
ARVID E. ROACH II